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GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,

Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, In a Representative Capacity on Behalf of a Class and for All Others Similarly Situated; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, In a Representative Capacity on Behalf of a Class and for All Others Similarly Situated,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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OTHER AUTHORITIES

P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 731-732 (2d ed. 1973) 20

Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947 (2001) 23

Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction,* 1996 Sup. Ct. Rev. 331 5

William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361 (1988) 29

1 E. Allan Farnsworth, *Farnsworth on Contracts* (3d ed. 1990) 5

Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767 (1994) 26

1 Stewart Macaulay, John Kidwell, William Whitford & Marc Galanter, *Contracts: Law in Action* 37 (1995) 16

5 Ian R. Macneil, et al. *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* app. I:41-44 (5th ed. 1994) 25

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David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, __ Law & Contemp. Probs. __ (forthcoming 2003), manuscript on-line at <http://www.law.wisc.edu/facstaff/pubs.asp?ID=453> [click on "FAA and Federalism – Download"] 20, 21, 25, 28

Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000) 5

Revised Uniform Arbitration Act, National Conference of Commissioners on Uniform State Laws, *Adhesion Arbitration Agreements and the RUAA*, (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm.> 21

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INTEREST OF AMICI CURIAE

Amici are law professors whose teaching and scholarship involve the fields of alternative dispute resolution, contracts, consumer law, employment law, and civil procedure.[1] Having studied the history and fundamental principles that underlie mandatory arbitration doctrine, and the application of the Federal Arbitration Act in state courts, amici are concerned that the preemption doctrine established in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), has had an unsettling effect on the law, particularly the substantive and remedial state law of contract, that is only increasing over time as *Southland* is expanded into new areas. Amici believe that sound principles of federalism and statutory interpretation compel the conclusion that *Southland* was, and remains, an ill-advised and aberrant decision; and that "proper application of *stare decisis* does not prevent correction of the mistake." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting).

SUMMARY OF ARGUMENT

Petitioner Green Tree Financial Corp. wrote an adhesion contract insisting upon arbitration as a condition of its customers doing business with it. Arbitration is what Green Tree got. This Court could simply say "be careful what you wish for" and send Green Tree on its way. But Green Tree's case is a symptom of a larger problem that

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and no person other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

will continue to plague lower courts and this Court as long as *Southland Corp. v. Keating*, 465 U.S. 1 (1984), remains the law. *Southland* lends itself to misapplication by lower courts, and to misguided arguments that the Federal Arbitration Act, 9 U.S.C. § 1, et seq., preempts any state law that would regulate any matter that can be written into an arbitration agreement. This Court should overrule *Southland* and hold that the FAA does not apply in state court or preempt state law.

Southland's current vitality has more to do with stare decisis policies than with that decision's merits. Five current members of this Court have written or joined opinions stating that *Southland* was wrongly decided. *See Southland*, 465 U.S. at 24 (O'Connor, J., joined by Rehnquist, J., dissenting) (*Southland* is "unfaithful to congressional intent, unnecessary, and . . . inexplicable"); *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting) ("the Court has effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J., dissenting) ("I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time"); *id.* at 285 (Thomas, J., dissenting) ("In my view, the Federal Arbitration Act does not apply in state courts"). No current member of this Court has had much good to say about *Southland* apart from pointing to the values of stare decisis. For example, Justice O'Connor reluctantly concurred with the *Southland* preemption principle, after twice dissenting from it, because "considerations of *stare decisis* . . . have special force in the area of statutory interpretation" and there appeared to be no "special justification" to overrule *Southland*. *Allied-Bruce*, at 285 (O'Connor, J., concurring) (internal quotations omitted); *see id.* at 272 (majority opinion reaffirming *Southland* on stare decisis grounds without defending decision on its own merits).

Weighty as such stare decisis concerns are, special circumstances do exist for overruling *Southland*. Indeed, the special circumstances are far stronger than those which supported this Court's decision, in the FAA area, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), to overrule the statutory interpretation precedent of *Wilko v. Swan*, 346 U.S. 427 (1953) (construing § 14 of the Securities Act of 1933 to prevent enforcement of pre-dispute agreement to arbitrate securities fraud claims).

First, *Southland* has proven unworkable. Due to its inherent tensions with the FAA § 2 "savings clause," *Southland* has generated a host of preemption questions, has been very difficult to apply with any consistency, and has invited contract drafters to engage in aggressive experimentation in grafting lopsided advantages onto arbitration agreements, thereby unsettling far more private expectations than it has settled.

Second, later cases have in fact eroded *Southland*'s authority by undermining its basic premise, that the FAA is substantive law binding on the states. This Court's arbitrability holdings from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), to *EEOC v. Waffle House*, 534 U.S. 279, 295 (2002), have consistently held that arbitration is not substantive, but is "procedural" in nature, *Rodriguez*, 490 U.S. at 482, and does not affect substantive rights.

Third, despite the frequent repetition of the phrase "national policy favoring arbitration," it remains wholly unexplained just what the *federal* interest is in dictating to states how they will structure their dispute resolution systems for the resolution of *state law claims*. Yet that is the impact of *Southland*, and the constitutionality of such an interpretation of the FAA seems highly questionable. Moreover, FAA preemption nullifies state policy choices on a broad swath of contract issues. By so interpreting the

FAA, *Southland* violates the principle established in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that federal statutes will not be construed to upset the federal/state balance without a clear statement from Congress of such an intent. *Southland*'s use of a quaint 1925 procedural statute as a judicial springboard for the creation of a body of federal substantive law rivals *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842), as one of the great federalism mistakes in the history of this Court's statutory interpretation cases.

ARGUMENT

I. THIS CASE PRESENTS THE PROPER OCCASION TO OVERRULE *SOUTHLAND*

A. Green Tree's Proposed Federal "Enforce as Written" Rule Would Create a Staggering Expansion of FAA Preemption That Must Be Rejected

Green Tree's argument here presses the *Southland* preemption rule to its very limit. According to Green Tree, the FAA creates a substantive rule of contract law that arbitration agreements must be enforced *as written*, notwithstanding any state law which may vary the effect or meaning of specified terms. Pet. Br. at 24-25. This is a truly extraordinary assertion. The net effect would be to give contract drafters like Green Tree a permanent federal exemption from any state contract regulation that could be argued to be waived in an arbitration clause. Today, Green Tree asserts that an arbitration agreement purportedly (though, in fact, not) written to exclude class actions must, as a matter of judge-made FAA law, be enforced in exactly those terms: arbitration without a class action. This in itself would be an extraordinary exemption from state consumer contract regulation, since "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive

for any individual to bring a solo action prosecuting his or her rights." *Amchem Prod. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotations omitted); *see* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 28-33 (2000).

Next term, Red Tree will be before this Court, arguing that it is functionally exempt from state-law claims for injunctive relief, or punitive damages or emotional distress damages, because the arbitration agreement precludes such claims and must be enforced "according to its terms." *See, e.g., West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 279-80 (W. Va.), *cert. denied*, 123 S. Ct. 695 (2002) (drafting party argued that FAA preempts application of state unconscionability doctrine to arbitration agreement purporting to waive punitive damages). Next, Blue Tree will come before the Court arguing that any general state contract law doctrine – be it unconscionability, mutuality of obligation, duress – which would operate to bar enforcement of an arbitration agreement "according to its terms" is nullified by FAA preemption. *See Discover Bank v. Superior Court*, 105 Cal. App. 4th 326, 129 Cal. Rptr. 2d 393, 408 (2003) (suggesting that FAA preempts any departure from enforcing arbitration agreements as written).

Adhesion contracts are often abused by drafting parties who seek unduly to control the rules of future disputes against them, *see, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 334-36, and the most common forms of contract regulation are judicial and legislative responses to limit such abuse of bargaining power. 1 E. Allan Farnsworth, *Farnsworth on Contracts* 517 (3d ed. 1990) ("[I]ncreasing awareness of the need to protect contracting parties against unfair terms has resulted in a plethora of legislation, both state and federal, to supplement the protection afforded by the common law and the Uniform Commercial

Code."). The FAA has been authoritatively construed to permit drafting parties to control only one particular aspect of dispute resolution – the choice of arbitration or court. But it has always been clear – in *this* Court, if not the lower courts – that the FAA expresses no "national policy" against state laws which protect consumers (or employees or other adhering parties) from having unfavorable dispute rules imposed on them distinct from the simple choice of arbitration over litigation. There is no "national policy" favoring oppressive venue clauses, waiver of class action remedies, waiver of damages remedies, one-sided arbitration procedures or other unconscionable terms, even if such terms can be grafted onto an arbitration agreement.

Green Tree's argument proves far too much. A rule requiring enforcement of an agreement literally "according to its terms" does conflict with a rule holding that, for instance, unconscionable terms will not be enforced. And since the enforcement rule is federal and the unconscionability rule state, federal law trumps. Because only a federal common law of contract defenses would withstand this preemption doctrine, Green Tree in effect offers a choice of two unacceptable futures: one in which arbitration agreements are exempt from any review whatsoever for fairness, or, at best, one in which contractual fairness review is completely federalized. Green Tree's argument must be rejected.

B. Rejection of Green Tree's Position on Narrow Grounds, While Appropriate, Will Leave Numerous *Southland*-Created Problems Unresolved

Southland is plainly at issue in this case, as it is in any case claiming FAA preemption of state law. To be sure, the Court could reject Green Tree's argument without reconsidering *Southland*. First, the Court could find that

Green Tree's arbitration clause does not in fact preclude class arbitrations: The contract strongly implies that class actions are permitted, and under *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995), any ambiguity in the agreement should be construed against the drafter.[2] Second, the Court could announce that Green Tree's federal "enforce as written" rule misconstrues the FAA.[3] This Court has never adopted a blanket federal rule of contract law that arbitration agreements are to be enforced "according to their terms" *irrespective of general state contract law*. On the contrary, this Court has been careful to point out that "commercial arbitration agreements, *like other contracts*, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 947 (1995) (emphasis added, internal quotations omitted). This means that, like other contracts, arbitration agreements are subject to a state's "generally applicable contract defenses" and rules that "arose to govern . . . contracts generally[.]" *Doctors Associates v. Casarotto*, 517 U.S. 681, 687 (1996).[4]

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[2] "The parties agree and understand that *the arbitrator shall have all powers provided by the law and* the contract. These powers shall include all legal and equitable remedies, including but not limited to, money damages, declaratory relief, and injunctive relief." Pet. Br. at 8 (emphasis added). Since South Carolina law gives arbitrators the power to decide class claims, the contract is most plausibly construed as affirmatively allowing class action arbitrations.

[3] Green Tree relies entirely on its proposed federal "enforce as written" rule; notably, Green Tree does not argue that the FAA itself, independently of contract terms, should be construed to bar class action arbitrations. Indeed, the FAA by its terms takes no position on class actions.

[4] Green Tree misconstrues this Court's decisions when it suggests that this Court intended to make arbitration agreements *more enforceable* than

(Continued on following page)

However, by resolving the case strictly on contract interpretation grounds, the Court would leave unresolved whether Green Tree's proposed federal "enforce as written" rule is implicit in the FAA and will settle no preemption questions at all. By rejecting the "enforce as written" rule without reconsidering *Southland*, the Court would fail to address the nagging, persistent questions about whether federal or state law applies to a host of enforceability questions, such as unconscionability, oppressive venue provisions, and mutuality of obligation. Even the class action question itself would return, with an arbitration clause expressly forbidding class actions: In other FAA cases, Green Tree has argued that a class action right bestowed on consumers by a consumer protection law is preempted by the FAA because *Southland* saves from preemption only "general" contract law, whereas a consumer protection statute is not "general." *See* Brief of Appellant in *Eastman v. Conseco Financing Servs. Corp.*, Wis. Sup. Ct. No. 01-1743, *bankruptcy stay entered* (2003). Some lower courts have bought into this argument, due to confusion about *Southland* preemption doctrine. *See, e.g., Bradley v. Harris Research*, 275 F.3d 884, 890 (9th Cir. 2001). Regrettably, this Court will be called upon repeatedly to

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other contracts by fully immunizing them from any state regulation on matters peripheral to the arbitration choice itself. While the "according to their terms" language is echoed in *Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 477-78 (1989) and *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995), neither of those cases can be read to hold that federal law prevents any reliance on state law to determine the enforceability of arbitration agreements. On the contrary both cases *applied* state law to resolve the issue presented: *Volt* holding that the FAA allowed state law arbitration procedures to be chosen by the parties, and *Mastrobuono* applying the state contract principle that ambiguities will be construed against the drafter. *See Volt*, 489 U.S. at 476-77; *Mastrobuono*, 514 U.S. at 62.

rectify these misapplications of preemption doctrine so long as *Southland* is controlling law.

II. "PROPER APPLICATION OF *STARE DECISIS* DOES NOT PREVENT CORRECTION OF THE MISTAKE" OF *SOUTHLAND*

A. *Southland's* Unworkable Test for Preemption Has an Unsettling Effect on the Law That Outweighs Any Legitimate Reliance Interests By Private Contracting Parties

1. Inherent Contradictions in the *Southland* Preemption Rule Put the FAA in Tension with Itself

Southland has been construed by this Court as creating a rule that state laws that target arbitration agreements for special barriers to enforcement are preempted, whereas "generally applicable contract defenses" and rules that "arose to govern . . . contracts generally" may be applied to arbitration agreements "without contravening [FAA] § 2." *Doctors Associates v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)). This distinction between "general contract law" and "arbitration-specific" rules, which reflects internal contradictions in *Southland*, is incoherent and has defied consistent application in all but the clearest cases.

The law held preempted in *Southland* was, in fact, general contract law. The antiwaiver provision in the California Franchise Investment Law provides that "[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with *any provision* of this law or any rule or order hereunder is void." Cal. Corp. Code § 31512 (emphasis added). The antiwaiver provision does not single out arbitration agreements at all. Adhesion contracts that force the weaker party to waive rights in advance have long been

disfavored under the general judge-made principle that contracts against public policy are void. *See Restatement (Second) of Contracts* §§ 178, 195. When a legislature attaches such an antiwaiver provision to a statute, it does nothing more than exercise its sovereign prerogative to declare public policy, and thereby remind a court to apply the "void as against public policy" doctrine. Construing a generic antiwaiver provision to preclude arbitration of claims under the statute simply applies a general contract principle to the specific instance of arbitration.

Indeed, since *Southland*, this Court has held that such an antiwaiver provision does *not* specifically target arbitration. In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), this Court overruled its earlier holding in *Wilko v. Swan,* 346 U.S. 427 (1953), to the effect that a generic antiwaiver provision in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n (a provision virtually identical to the one in *Southland*) precluded enforcement of pre-dispute agreements to arbitrate securities fraud claims. The issue in *Rodriguez* was not preemption, since a federal law was involved, but whether the generic antiwaiver provision was evidence of a specific Congressional intent to preserve the judicial forum against arbitration agreements. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (federal statutory claim not arbitrable if Congress evinces an intent to preclude arbitration). The *Rodriguez* Court determined, in essence, that the antiwaiver language does not specifically target arbitration: "the language prohibiting waiver . . . could easily have been read to relate to substantive provisions of the Act" rather than arbitration. 490 U.S. at 480 (internal quotations omitted). *Rodriguez* thus contradicts *Southland* on this key point.

Southland's holding that a generic statutory antiwaiver provision was preempted also creates an internal conflict in FAA § 2 between the enforcement language and

the modifying proviso "save upon such grounds as exist at law or in equity for the revocation of any contract." FAA § 2.[5] State legislatures' sovereign prerogative to declare public policy has always provided a basis "at law" for "the revocation of any contract." *See Restatement (Second) of Contracts* § 178. By holding otherwise, *Southland* contravened the recognized purpose of the FAA to place arbitration agreements "upon the same footing as other contracts," H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); *accord Volt Info. Sciences v. Stanford Univ.*, 489 U.S. 468, 479 (1989), and "make arbitration agreements as enforceable as other contracts but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

To resolve this contradiction, *Southland* asserted that "the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law." 465 U.S. at 16-17 n.11. But this interpretation of § 2 makes no sense. State legislatures do not typically legislate in the "general" terms suggested by *Southland.* Instead, they focus on specific categories of contracts marked by unequal bargaining power and other market failures: consumer contracts, franchise agreements and employment contracts, for example.[6] It would be

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[5] This language becomes a "savings clause" – in the sense of saving state law from preemption – only as a result of *Southland*'s general rule of preemption. Without *Southland* preemption, the proviso would function simply as a reminder to federal courts to apply state law contract defenses to arbitration agreements, rather than to create federal law.

[6] Any state code provides numerous examples demonstrating that most contract law is subject-specific, rather than "general." For example, Chapters 214 through 221 of the Wisconsin Statutes regulate

(Continued on following page)

inappropriate to make "one-size-fits-all" contract rules for the fundamental reason that, in contract, one size does not fit all. Rules protecting individual consumers or employees from overreaching may be wholly unnecessary to apply to agreements between two large business firms.

Southland's misguided notion of "general contract law" strongly implies that FAA preemption doctrine disfavors state legislation, compared to state judge-made rules. *See Southland*, 465 U.S. at 16 (holding that the FAA was "intended to foreclose *state legislative* attempts to undercut the enforceability of arbitration agreements"). To the extent that "general contract law" means judge-made principles to the exclusion of statutory public policies, *Southland*'s distinction is reminiscent of the now-discredited view of contract law of 100 years ago, in which universal or general principles of common law were "discovered" by courts, and legal rules enacted by legislatures were deemed inferior and dangerous. This view of the law, of course, has been rejected, and wisely so, ever since Holmes first pointed out that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Co. v. Jenson*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

The fundamental incoherence of *Southland's* distinction between general and specific contract law has defied this Court's subsequent efforts to clarify it. In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court stated that "state

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a variety of business entities – banking institutions, finance companies, car dealers, collections agencies, and others – in ways that control the terms of their contracts. The Wisconsin legislature has created special contracting rules to deal with insurance contracts, real estate contracts, landlord-tenant agreements and consumer contracts. *See* Wis. Stat. §§ 421.101 et seq., 631 et seq., 704.01 et seq., Chs. 706-709.

law, whether of *legislative or judicial* origin" is saved from preemption if it "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *id.* (emphasis added), whereas the FAA preempts only laws targeting arbitration agreements per se: "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Id.*; *accord Doctors Associates*, 517 U.S. at 687; *Allied-Bruce*, 513 U.S. at 281. Unfortunately, in correcting *Southland*'s inconsistency with the FAA, the *Perry, Doctors* and *Allied-Bruce* decisions give rise to a contradiction between themselves and *Southland*. If general contract law "of legislative or judicial origin" is saved from preemption by § 2, why would an antiwaiver provision – like the one struck down in *Southland* itself – be preempted?

2. The *Southland*-Based Distinction Between "General" and "Specific" Contract Law Creates Confusion Among Lower Courts about When State Contract Law Is Preempted

Courts and litigants have been turning somersaults to apply the distinction between a "general contract law" and a law which "takes its meaning" from the arbitration clause. This distinction – resulting from the clarification of *Southland*' s basic preemption rule in *Perry* and *Doctors* – has a tendency to break down. Perhaps an arbitration agreement written to preclude class actions or punitive damages can be held unconscionable without having that application of unconscionability doctrine "take its meaning" from the existence of the arbitration clause: Such terms could be unconscionable whether they were attached to an arbitration agreement or not. But what about a state-law principle that an arbitration agreement is unconscionable or otherwise unenforceable because the

obligation to arbitrate is not mutual? *See, e.g., Armendariz v. Foundation Health Psychare Servs.*, 24 Cal. 4th 83, 99 Cal. Rptr. 745, 769 (2000); *Arnold v. United Companies Lending Corp.*, 204 W.Va. 29, 511 S.E.2d 854, 861 (1998). Provisions holding that the drafting party has the exclusive right to choose the arbitrator have also been held unconscionable under general state contract law. *See, e.g., Graham v. Scissor Tail, Inc.*, 28 Cal.3d 807, 171 Cal. Rptr. 604, 615-17 (1981). These applications of unconscionability doctrine clearly "take their meaning" from the existence of the arbitration clause. Are they preempted?[7]

Moreover, the concept of "generally applicable contract law" lends itself to misapplication. For example, in *Bradley*

[7] The difficulty in applying the "general/specific" distinction is reflected in the difficulty courts have had in explaining it. Amici respectfully submit that this Court's explanatory effort in *Allied-Bruce*, for example, is itself potentially confusing:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.

513 U.S. at 281. The second sentence simply cannot mean what it sounds like. An arbitration agreement may be unfair under general contract law principles even if its basic terms are fair: a consumer contract may establish a reasonable sales price, but provide that future disputes will be arbitrated in Borneo before a panel of arbitrators chosen by the seller, with the consumer to pay a $1 million forum fee for his arbitration claim. Unconscionability doctrine recognizes that facts creating substantive contractual unfairness may differ not only from case to case, but also from term to term within a single contract. A great deal of unfairness in contracts stems not from the basic price bargain, but from subsidiary terms buried in the fine print – typically, terms seeking to gain an unfair advantage in potential future disputes.

v. Harris Research, 275 F.3d 884 (9th Cir. 2001), the court misapplied the concept to hold that a state statute barring unfair venue provisions in franchise agreements was preempted by the FAA. The court acknowledged that the state venue statute did not "single out" arbitration and would have applied irrespective of the presence of an arbitration agreement. But the court nevertheless concluded that "general" contract law under *Doctors Associates* means a law that applies to *every* contract, whereas the California statute "applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.' " 275 F.3d at 890. Accordingly the court held the venue statute preempted by the FAA.

Bradley errs by extending *Southland*'s "general/specific" distinction to a provision that does not apply directly to the basic contractual arbitration-over-litigation choice at all. A growing number of cases make this same error. *See Ting v. AT&T*, 2003 U.S. App. LEXIS 2395, at *59 (9th Cir., Feb. 11, 2003) (provision of California consumer protection statute prohibiting contractual waiver of class action remedy is preempted because consumer protection statute is not "general contract law"); *KKW Enterprises v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50 (1st Cir. 1999) (holding FAA preempts venue provision in state franchise law); *Doctors Associates v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (same).

These holdings threaten to undermine broad swaths of state contract regulation. Like Green Tree's proposed federal "enforce as written" rule, *Bradley*'s application of the "general/specific" distinction would have the effect of turning arbitration agreements into blanket exemptions from consumer protection and other statutes aimed at preventing contractual overreaching. An arbitration agreement could be written to mandate a waiver of injunctive relief, compensatory damages or attorneys fees guaranteed by a state consumer or antidiscrimination statute:

because those statutes are not "general contract law," they would be preempted and the arbitration agreement "enforced as written" under the *Bradley* analysis.[8]

The *Bradley* definition of "general contract law" is incoherent, because even apparently general contract defenses take their meaning from application to specific factual settings. A court is no more likely than is a legislature to find the need to apply protective doctrines like unconscionability to agreements freely negotiated between, say, Green Tree and Citibank, yet both the court and the legislature might well seek to apply an unconscionability protection to an individual consumer doing business with either of those firms. Moreover, the suggestion that there are general contract defenses that are wholly distinct from statutes creating public policies as to specific categories of contracts makes no sense. "General" contract law holds that "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable." *Restatement (Second) of Contracts* § 178(1).

[8] The Uniform Commercial Code, which has been adopted in some form in 49 states, is about as "general" as contract law gets. *See* 1 Stewart Macaulay, John Kidwell, William Whitford & Marc Galanter, *Contracts: Law in Action* 37 (1995). Yet even the U.C.C. would fail the "test" for generality adopted in *Bradley* and similar cases: the U.C.C. does not apply to "all contracts" – even taking all nine of its articles together – but rather is limited to "certain" commercial transactions. *See* U.C.C. preamble, *reprinted in Contract Law: Selected Course Materials* 7 (Burton & Eisenberg, eds. 2002). The limited scope of the U.C.C. is even more apparent when viewing its various articles separately: Article II of the U.C.C., of course, limits its scope to transactions in goods. *See* U.C.C. § 2-102.

3. *Southland* Has Created Too Much Legal Uncertainty to Create Significant Reliance by Private Parties

Few legitimate expectations are settled by *Southland*. On the contrary, it is clear that, in the past several years, corporate drafters of arbitration agreements have not been resting on settled expectations, but have been aggressively experimenting with arbitration agreements to find new ways to use them to limit their customers' or employees' remedies against them. *See, e.g., Ting v. AT&T*, 182 F. Supp. 2d 902, 924-28 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 2003 U.S. App. LEXIS 2395 (9th Cir., Feb. 11, 2003) (arbitration agreement purported to limit liability for willful misconduct, limit or bar compensatory and punitive damages, preclude class actions, and impose secrecy requirements); *Stirlen v. Supercuts*, 51 Cal. App. 4th 1519, 60 Cal. Rptr. 2d 138, 142-43 (1997) (arbitration agreement purported to require adhering party to waive tort damages and attorneys fees, while leaving drafting party free to pursue claims in court). The case at bar provides a telling illustration. Green Tree cannot reasonably have a "settled expectation" about whether its arbitration agreement will prevent class actions being brought against it, because the issue has produced contrary results. *Compare Bazzle v. Green Tree Financial* Corp., 351 S.C. 244, 569 S.E.2d 349 (2002) (allowing class arbitration); *Berger*, 567 S.E.2d at 279-80 (same), *with Ting*, 2003 U.S. App. LEXIS 2395, at *59 (FAA preempts state law preserving right to class action). Between drafting parties' efforts to "push the envelope," and confusion in the lower courts, *Southland* has put the law of arbitration too much in flux to create settled expectations.

Finally, it is worth pointing out that the "settled expectations" of the adhering parties have not prevented this Court from overruling other FAA precedents. In *Rodriguez*, 490 U.S. 477, this Court overruled the 36-year-old statutory

interpretation case of *Wilko v. Swan*, 353 U.S. 427 (1953), on the ground that *Wilko* had fallen out of step with the Court's subsequent views about arbitration, notwithstanding the settled expectations of securities customers that their fraud claims against brokerages could be brought in court. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court did not pause over the expectations of employees that had formed over 17 years around the near-unanimous understanding of the lower courts that *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974), preserved the judicial forum for statutory civil rights claims. *See, e.g., Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1188 (9th Cir.), *cert. denied*, 525 U.S. 996 (1998) (citing cases applying *Alexander* to bar enforcement of non-union predispute arbitration clauses in employment discrimination cases); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting) (majority decision overrules unanimous view of Courts of Appeals that antitrust claims not arbitrable).

B. *Southland*'s Basic Premise That the FAA Is Substantive Law Is Contradicted by this Court's Consistent Holdings Since 1985 That the FAA Is Fundamentally Procedural and Affects No Substantive Rights

A fundamental premise of *Southland* is that the FAA binds the states because it creates *substantive* rights. *See Southland*, 465 U.S. at 12 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983)) (FAA "'creates a body of federal substantive law' . . . applicable in state and federal courts"); 465 U.S. at 15 n.9 (FAA "creates federal substantive law"). Yet, in a consistent line of holdings on arbitrability of various statutory claims beginning in 1985, this Court has held, on the contrary, that the FAA's rule of enforcement of arbitration

agreements does not affect substantive rights. Rather, arbitration agreements are "in effect, a specialized kind of forum selection clause," *Rodriguez*, 490 U.S. at 482-83 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)), and a party compelled to arbitrate "does not forgo . . . substantive rights," but "only submits to their resolution in an arbitral, rather than a judicial, forum." *E.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *accord EEOC v. Waffle House*, 534 U.S. 279, 295 (2002) (arbitration agreement is "effectively a forum selection clause"); *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) ("by agreeing to arbitrate . . . a party does not forgo . . . substantive rights"). *Southland*'s determination that the FAA is substantive law traces back to *Wilko v. Swan*, 346 U.S. 427, 435-38 (1953), which held that arbitration affects substantive rights. That holding of *Wilko* was expressly overruled in *Rodriguez*, 490 U.S. at 481, which specifically held that the selection of an arbitral versus a judicial forum was merely "procedural." *Id.* at 482.

These holdings vitiate one of *Southland*'s two primary rationales for imposing FAA § 2 on the states: the purported need to impose a uniform federal rule to prevent forum shopping. *Southland*, 465 U.S. at 15.[9] Forum shopping is a concern only where the parties are able to shop for favorable *substantive* rules that are likely to affect the outcome. But because the enforcement *vel non* of the arbitration agreement should *not* affect the outcome of a case, there is no forum shopping problem – any more than with any forum selection clause, where the same substantive

[9] The other rationale for imposing § 2 on the states – the "national policy favoring arbitration" – is discussed in the following section.

law would be applied by the alternate fora. The possibility of a different arbitration-enforcement decision being made by a state court and a federal court in the same state should be no more troubling than is a situation where the state and federal courts would follow different conflict of laws rules in deciding whether to enforce a forum selection clause. The Court has found this very situation to be entirely unproblematic. *See Stewart Organization v. Ricoh Corp.*, 487 U.S. 22 (1988).[10]

[10] The notion that the FAA creates federal substantive law first appeared in dicta the term before *Southland*, in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 & n.32 (1983); *see Southland*, 465 U.S. at 24 (O'Connor, J., dissenting) (*Moses H. Cone*'s "dictum concerning the law applicable in state courts was wholly unnecessary to its holding"). Previously, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), this Court had "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies[.]" *Southland*, 465 U.S. at 24 (O'Connor, J., dissenting) (quoting P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 731-732 (2d ed. 1973).) *Prima Paint* had addressed an apparent *Erie* problem in the FAA by holding that where, as here, Congress has commerce power to regulate substantively, Congress may exercise a lesser-included power to make procedural rules for federal courts in diversity cases ("prescribe how federal courts are to conduct themselves"), even if the procedural rule is "outcome determinative" in the *Erie* sense. *See Prima Paint*, 388 U.S. at 404-05. But this *Erie* problem has disappeared since *Southland:* by holding that the FAA does not affect substantive rights, this Court has dispelled any notion that the FAA is "outcome determinative" for *Erie* purposes. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, __ Law & Contemp. Probs. __ (forthcoming 2003), manuscript on-line at <http://www.law.wisc.edu/facstaff/pubs.asp?ID=453> [click on "FAA and Federalism Download"] 38-48.

C. *Southland*'s Imposition of a "National Policy Favoring Arbitration" on the States Intrudes on the State-Federal Balance, Raises Constitutional Doubts and Violates the Fundamental Federalism Principles Established in *Gregory v. Ashcroft*

Cases about arbitration agreements are fundamentally contracts cases, and contracts are an area of traditional state regulation which federal courts should be "reluctant to federalize." *Patterson v. McLean Credit Union*, 491 U.S. 164, 183 (1989) (quoting *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977)). Since *Southland*, scores of state laws have been held preempted or become subject to FAA preemption.[11] While this Court has held that Congress may exempt a certain kind of claim from

[11] Last year alone, state laws were held preempted under *Southland* in at least 16 cases. Erroneous extensions of *Southland*, such as that pressed by Green Tree here, account for many instances of preemption. In addition, even "correct" applications of the misbegotten *Southland* decision cut a wide swath through state law. For example, at least 30 states have one or more statutes containing antiwaiver provisions of the kind held preempted in *Southland*. Many states have tried to regulate arbitration agreements by creating specific exceptions to a general state rule of specific enforcement of arbitration agreements, but *Southland* preempts these laws. *See* Schwartz, *supra*, at 12-13, and App. A, B.

Preemption stifles state law experimentation not only by nullifying state laws on the books, but also by discouraging proposals to change the law. For example, the National Conference of Commissioners on Uniform State Laws was considering addressing issues relating to adhesive arbitration agreements in its Revised Uniform Arbitration Act, but determined that "the preemptive effect of the Federal Arbitration Act, . . . dramatically limits meaningful choices for drafters addressing adhesion contracts[.]" NCCUSL, *Adhesion Arbitration Agreements and the RUAA* (last modified Aug. 23, 2000) <http://www.law.upenn.edu/bll/ulc/uarba/arbr0500.htm.>

arbitration by an express provision or implication showing such an intent, *McMahon*, 482 U.S. at 220, *Southland* denies this authority to the states. *See, e.g., Perry,* 482 U.S. 483 (preempting Cal. Lab. Code § 229 preserving the judicial forum for state wage and hour claims). *Southland* is very much out of step with this Court's federalism decisions of the past decade: Its broad rule of preemption comes at a very great cost to state lawmaking autonomy, the primary value of federalism, but its purported federal justification is illusory.

1. *Southland*'s Effect of Restructuring State Dispute Resolution Processes Without the Justification of a Strong Federal Interest Raises Doubts about the FAA's Constitutionality

The effect of *Southland* is to restructure state dispute resolution processes for state law claims. *See Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting) (*Southland* entails "a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"). Cases in which a state would open its courts to litigants, are compelled into arbitration under *Southland*, irrespective of the presence of a substantive federal interest – that is, a federal interest other than an interest in the dispute resolution process itself.[12] The traditional means for Congress to guarantee certain procedures for federal claims is not to dictate procedure to state courts, but to create federal question jurisdiction to open the doors of the

[12] To the extent there is a federal interest in protecting arbitration for federal claims filed initially in state court, that interest is adequately protected, even without *Southland* preemption, by removal jurisdiction. *See* 28 U.S.C. § 1441.

federal courthouse to the claim. The authority of Congress to restructure state dispute resolution procedures for *federal* claims is far from clear. *See* Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 Vill. L. Rev. 1, 42-52 (1999) (canvassing federalism problems in federal regulation of state court procedures); Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 Yale L. J. 947 (2001) (same). Does the commerce power authorize Congress to restructure state dispute resolution processes for *state law* claims, even under the guise of "substantive" regulation of interstate contracts?

Imagine Congress passing an Expeditious Dispute Resolution Act of 2004. In the interest of the expeditious resolution of disputes involving contracts relating to interstate commerce, all such disputes in state court shall follow certain federally-mandated rules. First, no jury trial will be permitted; all such cases must be tried to the court. Second, state appellate courts may only reverse trial court judgments for "manifest disregard of the law." Third, denial of motions for summary judgment shall be immediately appealable, to the state appellate court, on an interlocutory basis, before the case is tried. The constitutionality of such a statute is doubtful at best. "We have made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997). In *Johnson*, this Court was unanimous in observing that "respect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." *Id.* at 922.

Yet *Southland* permits a federal restructuring of state dispute resolution procedures in very comparable ways. It does not matter, from a federalism standpoint, that the mechanism for this restructuring under the FAA, as opposed to the hypothetical "EDRA," relies on the mediating device

of a private contract. The EDRA could as well be written as an authorization to contracting parties – including parties to contracts of adhesion – to "agree" to an EDRA clause, and then providing as a matter of federal law that the EDRA clause will be "rigorously enforced" to bar jury trial, limit the grounds for appellate review, and permit interlocutory appeals of summary judgment denials. Yet the federal intrusion on state dispute resolution processes is in no way lessened by the presence of the contract term.

What exactly is the federal interest in restructuring state dispute resolution procedures for state law claims or, as in the case at bar, for dictating to a state whether its arbitrations of state law claims should proceed on an individual basis only or as a class action? It has become a commonplace to respond to this question merely by waving the flag of the so-called "national policy favoring arbitration," *Southland*, 465 U.S. at 10, as though that were an explanation.

When Congress displaces state dispute resolution procedures, in whole or in part, by creating exclusive jurisdiction in federal district courts, *e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78aa, or federal administrative tribunals, *e.g.*, National Labor Relations Act §§ 3, 10, 29 U.S.C. §§ 153, 160, it does so by asserting plenary *substantive* authority over a particular subject matter, and at least implicitly identifying a strong federal interest in that subject matter. *See* NLRA § 1, 29 U.S.C. § 151. Thus, for example, collective bargaining agreements, although private contracts in form, have long been regarded as contracts carrying national public policy implications, due to the history of labor strife. *See Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 577-78 (1960).

The FAA, in contrast, evinces a Congressional intent to bring private contractual arbitration agreements into general contract law, not lift them out of it into a category

of special federal concern.[13] Not only has Congress failed, in the FAA or otherwise, to identify alternative dispute resolution as a matter of pressing national concern that must be imposed on all levels of government, but one searches the FAA in vain for any substantive federal policy that might be at stake in such matters as whether a state will keep its courthouse doors open to state law wage and hour claims.[14] Although the FAA identifies a federal nexus – contracts involving interstate commerce or admiralty – this Court has never found in the FAA an intent to assert plenary substantive authority over all such contracts, even those interstate commerce contracts containing arbitration agreements. The absence of substantive federal policy underlying the FAA explains why the FAA *does not even create federal question jurisdiction*. *See Southland*, 465 U.S. at 15 n.9.

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[13] *Moses H. Cone*'s assertion of a federal pro-arbitration policy is based on an unsound analogy to labor arbitration. *See* Schwartz, *supra*, at 49-55, 59-60. *Compare Moses H. Cone*, 460 U.S. at 24 ("the effect of [FAA § 2] is to create a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the act"), *with Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450 (1957) (LMRA § 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements") *and Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) (judicial role is that "of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements").

[14] If *Southland* was motivated by a lack of confidence in the states' ability to find their own way toward alternative dispute resolution, such mistrust of the states is not only inconsistent with federalism values, but also would have proven unjustified. Most states have, in general, rigorously enforced arbitration agreements and promoted non-binding ADR as well. *See* 5 Ian R. Macneil, et al. *Federal Arbitration Law: Agreements, Awards & Remedies Under the Federal Arbitration Act* app. I:41-44 (5th ed. 1994).

2. Federalism Principles Reaffirmed Since *Southland* Caution against Courts Finding Preemption in Reticent Statutes

The values of federalism, articulated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), provide a basis for evaluating *Southland*'s federalism error:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458; *accord United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *Gregory* as setting forth the "first principles" of federalism); *id.* at 581 (Kennedy, J., concurring) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (arguing that states can serve as "laboratories for experimentation" in social policy)). Each of these values of federalism assumes a substantial degree of state lawmaking autonomy; none would have much meaning if the states were merely "regional offices [ ]or administrative agencies of the federal government." *New York v. United States*, 505 U.S. 144, 188 (1992).

Preemption doctrine represents the most significant and frequently applied limitation on substantive state autonomy in our constitutional scheme. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Corn. L. Rev. 767, 768 (1994). While federal commerce power still potentially reaches most subjects of legislation even after *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), preemption doctrine holds that Congress may nullify state

law on any subject within federal legislative jurisdiction. Therefore,

> the true test of federalist principle may lie, not in the occasional effort to trim Congress's commerce power at its edges . . . or to protect a state treasury from a private damage action . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law

– namely, preemption cases. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Recognizing this, decisions of this Court have held that federalism principles support a presumption against preemption: " 'where . . . the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) (quoting *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990)). "To the extent that federal statutes are ambiguous, we do not read them to displace state law." *Allied-Bruce*, 513 U.S. at 292 (Thomas, J., dissenting); *accord Southland*, 465 U.S. at 18 (Stevens, J., concurring in part and dissenting in part) ("The exercise of state authority in a field traditionally occupied by state law will not be deemed preempted by a federal statute unless that was the clear and manifest purpose of Congress"). In *Gregory*, the Court made this principle an even broader rule of statutory construction: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute." 501 U.S. at 460 (internal quotations omitted).

3. This Court's "Clear Statement" Rule Announced in *Gregory v. Ashcroft* Undermines Any Contention that *Southland* Properly Construes the FAA

Does the FAA include a "clear statement" of Congressional intent to preempt state law, as would be required under *Gregory*? No. It is widely recognized that the "national policy favoring arbitration" was not the creation of the FAA as written by Congress, but was instead a judicial creation – federal common law – that took the FAA as a point of departure. *See Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring) ("the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation"). As has been clearly demonstrated in two scholarly dissenting opinions from this Court, the *Southland* opinion flouted the FAA's historical record, which showed that Congress intended the FAA to be a procedural statute that neither applied in state court nor preempted state law. *See Southland*, 465 U.S. at 23-31 (O'Connor, J., dissenting); *Allied-Bruce*, 513 U.S. at 285-95 (Thomas, J., dissenting).[15] But even the *Southland* majority opinion conceded the absence of anything that would meet the "clear statement" test, by going outside the FAA's text to rely on a legislative history that was "not without ambiguities." 465 U.S. at 12. There is no question that were *Southland* being decided for the first time today, this Court would apply *Gregory* to reject the argument that the FAA is substantive law binding on the states.

[15] For additional historical evidence supporting the arguments in the O'Connor and Thomas dissents, *see* Schwartz, *supra*, at 19-31.

4. *Southland* Suffers from Constitutional Infirmities Comparable to *Swift v. Tyson*

Southland is not a garden variety error in statutory interpretation, where the Court can rely on Congress to clear up a disagreement over statutory intent. *Southland* is a major federalism error that attributes to Congress an intention to intrude on state autonomy to a degree that pushes the FAA to the limits of Congressional power, if not beyond, and thereby violates the precepts of *Gregory v. Ashcroft*. If it is an important attribute of this Court's role to correct the federalism mistakes of Congress, *see Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) ("the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far"); *Morrison*, 529 U.S. at 617 n.7, it seems paradoxical to say that the Court cannot correct its own – that only Congress should do so.

Special circumstances warrant overruling *Southland*. Stare decisis "is not an inexorable command. The instances in which the court has disregarded its admonition are many." *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting).[16] Fourteen years later, a majority of the Court joined Justice Brandeis, in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to overrule a 96-year-old statutory interpretation precedent, *Swift v. Tyson*, 42 U.S. (16 Pet.) 1 (1842). *Erie* held that *the judicial interpretation* given to

[16] "Notwithstanding the rule [of statutory stare decisis], the Supreme Court has overruled or materially modified statutory precedents more than eighty times" between 1961 and 1988. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L. Rev. 1361, 1427-39 (1988).

§ 34 of the 1789 Judiciary Act by *Swift* – not the statute itself – was unconstitutional, because it allowed the federal courts to make law on subjects outside the legislative power of Congress. Although *Southland's* FAA is narrower in scope than the general federal law considered in *Erie,* its effect on the states goes deeper: federal common law under *Swift* was not applicable in state court, and state statutes could in effect overrule federal common law decisions. *See Erie*, 304 U.S. at 71 (quoting *Swift*, 42 U.S. (16 Pet.) at 10) ("positive statutes of the state" are rules of decision under § 34). But *Southland* holds that the federal common law of the FAA binds state courts and nullifies state statutes. Thus, *Southland*'s reliance on the FAA – a fundamentally procedural law – as a basis to create a body of federal judge-made law that preempts state lawmaking is arguably even more constitutionally unsound than *Swift.* It is time that *Southland* be overruled.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the South Carolina Supreme Court.

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Respectfully submitted,

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